

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----  
KEVIN PITCHER,

Plaintiff,

-vs-

**NOTICE OF CROSS-MOTION**

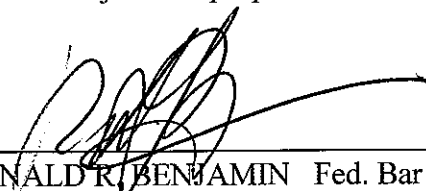
Case No. 08-Civ-3075

MERCK & CO., INC.,

Defendant.  
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PLEASE TAKE NOTICE that upon the attorney affirmation of Ronald R. Benjamin, dated the 10th day of April, 2008, and the Defendant's Notice of Removal and exhibits, and the accompanying Memorandum of Law, dated April 10, 2008, and upon all the pleadings and prior proceedings heretofore had, served and/or filed herein, plaintiff will cross-move this Court, before the Honorable George B. Daniels at a date to be set by the Court, in the United States Courthouse for the Southern District of New York, for an order pursuant to 28 U.S.C. §1447(c) remanding this action back to the New York State Supreme Court for the County of New York from which it was improperly removed by defendant Merck & Co., Inc., on the grounds of alleged fraudulent joinder and other allegations of tactically avoiding removal, and will seek such other and further relief as is just and proper.

Dated: April 10, 2008  
Binghamton, New York

  
\_\_\_\_\_  
RONALD R. BENJAMIN Fed. Bar No. 101131  
LAW OFFICE OF RONALD R. BENJAMIN  
Attorneys for Plaintiff  
126 Riverside Drive, P. O. Box 607  
Binghamton, New York 13902  
607/772-1442

TO: Theodore V. H. Mayer, Esq.  
Vilia B. Hayes, Esq.  
Robb W. Patryk, Esq.  
HUGHES HUBBARD & REED LLP  
Attorneys for Defendant Merck & Co., Inc.  
One Battery Park Plaza  
New York, New York 10004-1482

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----  
KEVIN PITCHER,

Plaintiff,

**ATTORNEY AFFIRMATION**

-vs-

Case No. 08-Civ-3075

MERCK & CO., INC.,

Defendant.

-----  
STATE OF NEW YORK     )  
                                  ) ss:  
COUNTY OF BROOME     )

RONALD R. BENJAMIN, an attorney duly admitted to practice in the State of New York,  
hereby affirms under penalty of perjury as follows:

1. I am the attorney for the plaintiff and make this affirmation in support of plaintiff's opposition to the defendant's motion to stay the proceedings pending a decision on transfer by the Judicial Panel on Multi-District Litigation.
2. This affirmation further supports the plaintiff's instant cross-motion to remand this action back to the New York State Supreme Court for the County of New York from which it was removed by defendant Merck & Co., Inc., on the grounds of alleged tactical avoidance of removal, which appears to also suggest fraudulent joinder.
3. Plaintiff was originally named in the caption of a multi-plaintiff action filed on February 2, 2005, in the Supreme Court of the State of New York for the County of New York, entitled Charles H. Dixon, Mayra Figueroa, Margharita Giordano, Mary K. Matias, Kevin Pitcher, and Marianne Raftis v. Pfizer, Inc., Pharmacia Corporation, a wholly-owned subsidiary of Pfizer, Inc., and Pharmacia & Upjohn Company, a wholly-owned subsidiary of Pharmacia Corporation, and Merck & Co., Index No. 101551/05, as confirmed by Merck's Acknowledgment of Service, annexed

annexed hereto as **Exhibit A**.

4. By Administrative Order dated April 14, 2006, all cases seeking damages for ingestion of Bextra, Celebrex and Vioxx, whether alone or in combination, were assigned to the Hon. Shirley W. Kornreich for the purpose of coordination for all purposes. *See Administrative Order, annexed as last document in Merck's Ex.4., at page 1.*

5. Plaintiffs in multi-plaintiff complaint captions were required to file separate actions by the prior orders of the Honorable Helen Freedman (*see copies of orders annexed hereto as **Exhibit B***), and for that reason, plaintiff commenced a separate action by filing of the complaint with the New York Supreme Court for the County of New York on August 11, 2006. *See Complaint annexed as Exhibit 1 to Notice of Removal*

6. As Merck appears to concede in its moving papers, it did not seek to remove the original complaint during the one-year period after it was filed, nor the separate complaint during the one-year period after it was filed.

7. On its face, the complaint alleges product liability and fraud claims against defendant Merck & Co., as well as Pfizer, Inc., arising out of the plaintiff's ingestion of their respective drugs Vioxx and Celebrex. *Id., at paras. 15-16.* It is clear from the complaint that plaintiff alleged indivisible injury based on the same personal injury risks posed by these two drugs.

8. The complaint alleges plaintiff "ingested the drug Bextra in or about 2002, as directed by his physicians and in accordance with the respective manufacturer's instructions." *Complaint, Merck Ex. 1, at para. 16.* His ingestion of Celebrex at the 200 mg daily dose in 2001 to 2002 is documented in medical records. *See **Exhibit C**.*

9. On the face of the original multi-plaintiff complaint and the instant separate action complaint, it is clear plaintiff did not sue any physician, salesman distributor or fictitious John Doe;

rather, they confirm he sued as co-defendants only the manufacturers of the other Cox-II inhibitor drugs plaintiff ingested, manufactured and marketed by Merck's competitor, Pfizer

10. Further, the complaints allege both the plaintiff and defendant Pfizer are citizens of the State of New York (*Notice of Removal, at para. 5*), and defendant's removal papers do not in any respect indicate there is any evidence that defendant Pfizer is not a citizen of New York State as alleged in the complaint at the time of filing. Instead, defendant Merck appears to concede diversity of citizenship was not a basis for federal jurisdiction in this case at the time either the original or amended complaint was filed, and claims the Stipulation that discontinued plaintiff's claims against its co-defendant Pfizer almost three years later was some kind of "tactical avoidance."

11. Merck is or should be fully aware there is ongoing nationwide litigation against the Pfizer defendants, as well as multidistrict litigation, and that on November 19, 2007, the Honorable Charles R. Breyer issued an opinion holding that the "plaintiffs have not presented scientifically reliable evidence that Celebrex causes heart attacks or strokes when ingested at the 200 milligram a day dose." IN RE: BEXTRA AND CELEBREX MARKETING SALES PRACTICES AND PRODUCT LIABILITY LITIGATION (MDL No. 1699), 524 F. Supp. 2d 1166, 1169, 2007 U.S. Dist. LEXIS 85382 at \*40 (N.D.CA 2007).

12. Judge Breyer's order came within days after the Compliance Motion Order entered by Special Master Fern M. Smith cited by Merck, which required expedited compliance with discovery requirements of Case Management Order No. 6 within 21 days. *See Merck's Ex. 4 annexed to the Notice of Removal*. However, it is clear Judge Breyer's decision intervened and had a clear impact on the viability of the plaintiff's claims based on her ingestion of Celebrex.

13. Indeed, thereafter, Pfizer filed a motion for failure to comply with Judge Smith's expedited order, and it was not until March 5, 2008, that plaintiff's counsel signed the Stipulation of

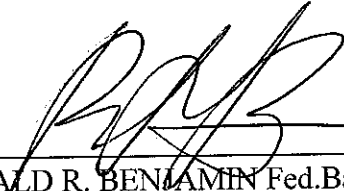
Dismissal with Prejudice Against Pfizer Defendants. *See Stipulation annexed as Ex. 2 to Notice of Remand.*

14. However, it is significant that, on February 25, 2008, prior to executing the Stipulation, counsel for plaintiff filed a cross-motion for an extension of time based on the fact that "Judge Breyer's decision and the overlapping events...have clearly raised significant issues as to the likelihood of success of each of the plaintiff's claims [based on Celebrex]" which required him to evaluate the individual claims and identify claims that should be discontinued and advise the plaintiffs of the same. *See annexed hereto as Exhibit D, Attorney Affirmation (without exhibit) in support of cross-motion, at paras. 6-7.*

15. In view of the aforesaid matters confirming there was no fraudulent joinder or tactical avoidance that supports removal beyond the one-year period, it is respectfully requested that this Court should DENY the defendant's motion for a stay since the rules provide plaintiff without thirty days within which to file a motion to remand, and this Court is the only court that currently has jurisdiction over this case.

16. Moreover, this Court should GRANT the plaintiff's cross-motion to remand this action to the New York State Supreme Court for the County of New York, in the coordinated litigation before Judge Kornreich which will obviate the transfer of this case.

Dated: April 10, 2008  
Binghamton, New York



RONALD R. BENJAMIN Fed.Bar No. 101131  
LAW OFFICE OF RONALD R. BENJAMIN  
Attorneys for Plaintiff  
126 Riverside Drive, P. O. Box 607  
Binghamton, New York 13902  
607/772-1442

**Exhibit**

**A**

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

-----X  
CHARLES H. DIXSON, MAYRA FIGUEROA,  
MARGHARITA GIORDANO, MARY K. MATIAS,  
KEVIN PITCHER, and MARIANNE RAFTIS,

Plaintiffs,

- against -

PFIZER, INC., PHARMACIA CORPORATION, a  
wholly-owned subsidiary of PFIZER, INC.,  
PHARMACIA & UPJOHN COMPANY, a wholly-  
owned subsidiary of PHARMACIA CORPORATION,  
and MERCK & CO., INC.,

Defendants.

-----X  
TO: Merck & Co., Inc.  
One Merck Drive  
P.O. Box 100 WS3AB-05  
Whitehouse Station, New Jersey 08889-0100

I received a summons and complaint in the above captioned matter at

Whitehouse Station NJ

Please check one of the following:

1. ☒ I am not in the military service.
2. ☐ I am in the military service, and my rank, serial number and branch of service are as follows:

Rank: \_\_\_\_\_

Serial Number: \_\_\_\_\_

Branch: \_\_\_\_\_

TO BE COMPLETED REGARDLESS OF MILITARY STATUS:

Date: March 8, 2005

(Date this Acknowledgment is executed)

I affirm the above as true under penalty of perjury.

Signature: Hughes Hubbard + Reed LLP by Vilia B. Hayes

Print Name: Hughes Hubbard + Reed LLP by Vilia B. Hayes

Address: One Battery Park Plaza  
New York, NY 10004

Name of Defendant for which acting: Merck & Co., Inc.

Position with Defendant for which acting (i.e., officer, attorney etc.)

PLEASE COMPLETE ALL BLANKS INCLUDING DATES.

**Exhibit**

**B**



PRESENT: Helia E. Freedman  
Justice

PART 39

Dixon, C

INDEX NO.

101551/05

MOTION DATE

MOTION SEQ. NO.

01

MOTION CAL. NO.

- v -

Pfizer

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

*To dismiss by Pfizer et al is granted with leave to plead in separate actions. Plaintiff's Counsel may not join six plaintiffs in a single action and then set forth claims in non specific generalities. New ~~claim~~ Complaints shall specify where, how long ingested, what specific misrepresentations were made and to whom and specify damages and damages. GBL 349 claim will probably be dismissed permanently.*

Dated: 4/2/05

Hef  
J.S.C.

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUDGE FOR THE FOLLOWING REASON(S):

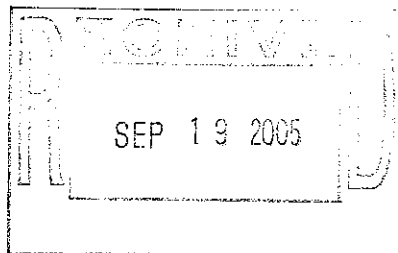


(607) 772-1442

*Attorneys for Plaintiffs*

Vilia B. Hayes, Esq.  
HUGHES HUBBARD & REED LLP  
One Battery Park Plaza  
New York, New York 10004

*Attorneys for Defendant Merck & Co., Inc.*



**Exhibit**

**C**

PHARMACY NAME: CVS PHARMACY #1951  
ADDRESS: 1103 NORTH ST,  
CITY, ST, ZIP: ENDICOTT NY 13760

PATIENT KEY: 1951283181  
PATIENT NAME: PITCHER KEVIN  
ADDRESS: 517 RIVER TERRACE  
CITY, ST, ZIP: ENDICOTT NY 13760

TELEPHONE: 607-748-5292  
BIRTHDATE: 09/20/1959

ALLERGIES: None communicated by the patient

CONDITIONS: None communicated by the patient

EX NUMBER	REF NDC NUMBER	DRUG DESCRIPTION	PREScriBER NAME	DATE FILLED	RPH INT	QUANT DISP.	PRIMARY PAYER #	SCDRY PAYER #	TOTAL PRICE	PRIMARY PD AMT	SCDRY PD AMT	PATIENTS PD AMT
190357	0	00093067006 GEMFIBROZIL 600MG TABLET	FLOYD, FRANK D	03/23/1998	DB	60	7300		13.05	10.05		.00
190357	1	00093067006 GEMFIBROZIL 600MG TABLET	FLOYD, FRANK D	05/03/1998	DB	60	7300		13.30	10.30		.00
190357	2	00093067006 GEMFIBROZIL 600MG TABLET	FLOYD, FRANK D	06/13/1998	DB	60	7300		13.30	10.30		.00
190357	3	00093067006 GEMFIBROZIL 600MG TABLET	FLOYD, FRANK D	07/19/1998	LB	60	7300		13.30	11.30		.00
190357	4	00093067006 GEMFIBROZIL 600MG TABLET	FLOYD, FRANK D	08/27/1998	AC	60	7300		13.05	11.05		.00
190357	5	00093067006 GEMFIBROZIL 600MG TABLET	FLOYD, FRANK D	10/20/1998	KM	60	7300		13.05	11.05		.00
191556	0	00026851351 CIPRO 500MG TABLET	FLOYD, FRANK D	03/31/1998	DB	28	7300		90.27	85.27		.00
197009	0	00026851351 CIPRO 500MG TABLET	FLOYD, FRANK D	05/08/1998	AD	60	7300		191.15	186.15		.00
200396	0	00026851450 CIPRO 750MG TABLET	FLOYD, FRANK D	06/02/1998	LB	28	7300		93.80	88.80		.00
215846	0	51285029502 GUAIFEN/P-PROP 400/75 TB	NASH, D M	06/20/1998	SS	40	7300		4.98	1.98		.00
215847	0	00093117310 PENICILLIN VK 500MG TABLET	VERDON, CATHY	09/23/1998	DB	30	7300		4.18	2.18		.00
218175	0	00026851351 CIPRO 500MG TABLET	VERDON, CATHY	10/08/1998	LB	60	7300		6.66	4.66		.00
221216	0	00054418225 DEXAMETHASONE 1.5MG TABLET	FLOYD, FRANK D	10/27/1998	LB	20	7300		6.97	4.97		.00
227579	1	00093067006 GEMFIBROZIL 600MG TABLET	FLOYD, FRANK D	12/04/1998	LB	60	7300		13.05	11.05		.00
227579	2	00093067006 GEMFIBROZIL 600MG TABLET	FLOYD, FRANK D	01/30/1999	LB	60	7300		13.30	11.30		.00
230128	0	00364034701 METHOCARBAMOL 750MG TABLET	FLOYD, FRANK D	02/24/1999	LB	60	7300		13.30	11.30		.00
230129	0	52544038701 HYDROCODONE/APAP 7.5/750	VERDON, CATHY	12/18/1998	TA	40	7300		12.99	10.99		.00
246254	0	00056017270 COUNADIN 5MG TABLET	VERDON, CATHY	12/18/1998	TA	40	7300		7.69	5.69		.00
246487	1	00056017270 COUNADIN 5MG TABLET	FLOYD, FRANK D	03/22/1999	LB	60	7300		37.05	32.05		.00
249700	0	51285041702 GUAIFENESIN 600MG TABLET	KELLING, DOUG	03/23/1999	LB	50	7300		5.55	3.55		.00
249701	0	00093060732 AMOXIL 500MG CAPSULE	FAREEK, GAUFA	04/09/1999	LB	20	7300		5.44	3.44		.00
251933	0	50111035401 MECLIZINE 25MG TABLET	FAREEK, GAUFA	04/09/1999	LB	30	7300		6.22	4.22		.00
251934	0	00093060720 AMOXIL 875MG TABLET	VINCENT, PATRI	04/23/1999	SS	20	7300		3.04	1.04		.00
253234	0	00093067006 GEMFIBROZIL 600MG TABLET	VINCENT, PATRI	04/23/1999	SS	20	7300		18.67	13.67		.00
253234	1	00093067006 GEMFIBROZIL 600MG TABLET	FLOYD, FRANK D	05/02/1999	DB	60	7300		13.30	11.30		.00
253234	2	00093067006 GEMFIBROZIL 600MG TABLET	FLOYD, FRANK D	06/05/1999	LB	60	7434		13.55	11.55		.00
257459	1	17564010508 SALSALATE 750MG TABLET	FLOYD, FRANK D	07/06/1999	LB	60	7434		13.55	11.55		.00
257459	2	17564010508 SALSALATE 750MG TABLET	FLOYD, FRANK D	05/1999	LL	40	7434		6.75	4.75		.00

CVS PHARMACY  
Patient Prescription Record  
01/01/1998 11/19/2004  
PHARMA # 1951



PHARMACY NAME: CVS PHARMACY #1951  
ADDRESS: 1103 NORTH ST,  
CITY, ST, ZIP: ENDICOTT NY 13760

PATIENT KEY: 1951283181  
PATIENT NAME: PITCHER KEVIN  
ADDRESS: 517 RIVER TERRACE  
CITY, ST, ZIP: ENDICOTT NY 13760

TELEPHONE: 607-748-5292  
BIRTHDATE: 09/20/1959

EX	REL	NDC	NUMBER	DRUG DESCRIPTION	PRESCRIBER NAME	DATE	RPH	QUANT	PRIMARY	SCDEX	TOTAL	PRIMARY	SCDEX	PATIENT
398749	0	00555083302	0	WARFARIN SODIUM 5MG TABLE	FLOYD, FRANK D	05/22/2001	EL	60	145		33.07	33.07		00
398749	1	00555083302	1	WARFARIN SODIUM 5MG TABLE	FLOYD, FRANK D	07/27/2001	TA	60	145		33.07	33.07		00
398749	2	00555083302	2	WARFARIN SODIUM 5MG TABLE	FLOYD, FRANK D	10/03/2001	CL	60	145		33.07	33.07		00
398749	3	00555083302	3	WARFARIN SODIUM 5MG TABLE	FLOYD, FRANK D	10/30/2001	KK	60	145		37.79	37.79		00
398750	0	00025152531	0	CELEBREX 200MG CAPSULE	FLOYD, FRANK D	05/22/2001	EL	30	145		72.45	72.45		00
398750	1	00025152531	1	CELEBREX 200MG CAPSULE	FLOYD, FRANK D	07/13/2001	TA	30	145		72.45	72.45		00
405634	0	0006306075	0	ZITHROMAX 250MG Z-PK TAB	NASH, DONAL W	06/25/2001	TA	6	145		41.16	41.16		00
407151	0	00049490066	0	ZOLOFT 50MG TABLET	FLOYD, FRANK D	07/03/2001	EL	30	145		68.75	68.75		00
407152	1	00085045803	1	CLARITIN 10MG TABLET	FLOYD, FRANK D	07/03/2001	EL	30	145		72.05	72.05		00
407152	1	00085045803	1	CLARITIN 10MG TABLET	FLOYD, FRANK D	08/14/2001	EL	30	145		72.05	72.05		00
414610	0	00025152031	0	CELEBREX 100MG CAPSULE	FLOYD, FRANK D	08/14/2001	KK	30	145		43.66	43.66		00
414610	1	00025152031	1	CELEBREX 100MG CAPSULE	FLOYD, FRANK D	09/20/2001	DB	30	145		43.66	43.66		00
414610	2	00025152031	2	CELEBREX 100MG CAPSULE	FLOYD, FRANK D	10/22/2001	DB	30	145		43.66	43.66		00
419821	0	00378012901	0	PROPOXYPHENE HCL 65MG CAP	FLOYD, FRANK D	09/11/2001	KK	60	145		21.49	21.49		00
419822	0	00088110947	0	ALLEGRA 180MG TABLET	FLOYD, FRANK D	09/11/2001	KK	30	145		62.68	62.68		00
422561	0	00406036005	0	HYDROCODONE/APAP 7.5/750	FLOYD, FRANK D	09/25/2001	EL	40	145		11.50	11.50		00
424182	0	00026851251	0	CIPRO 250MG TABLET	SMITH, DONAL L	10/02/2001	AF	8	145		33.24	33.24		00
424519	0	00075150616	0	NASACORT AQ NASAL SPRAY	DIONISIO, CESAR	10/03/2001	CL	17	145		48.29	48.29		00
424740	0	17314850101	0	DITROPAN XL 10MG TABLET S	SMITH, DONAL L	10/04/2001	DB	5	145		17.04	17.04		00
442547	1	00093067006	1	GENFIBROZIL 600MG TABLET	FLOYD, FRANK D	12/28/2001	KK	60	4000		15.43	15.43		00
442547	2	00093067006	2	GENFIBROZIL 600MG TABLET	FLOYD, FRANK D	02/09/2002	KK	60	4000		15.00	15.00		00
442547	3	00093067006	3	GENFIBROZIL 600MG TABLET	FLOYD, FRANK D	03/14/2002	DB	60	4000		15.00	15.00		00
442547	4	00093067006	4	GENFIBROZIL 600MG TABLET	FLOYD, FRANK D	04/24/2002	KK	60	4000		15.00	15.00		00
445119	0	00025152031	0	CELEBREX 100MG CAPSULE	FLOYD, FRANK D	05/30/2002	SD	60	4000		15.00	15.00		00
448334	0	00555083302	0	WARFARIN SODIUM 5MG TABLE	FLOYD, FRANK D	01/09/2002	KK	60	4000		60.25	60.25		00
448334	1	00555083302	1	WARFARIN SODIUM 5MG TABLE	FLOYD, FRANK D	01/23/2002	SX	60	4000		12.70	12.70		00
448334	2	00555083302	2	WARFARIN SODIUM 5MG TABLE	FLOYD, FRANK D	03/20/2002	KK	60	4000		12.70	12.70		00
448334	3	00555083302	3	WARFARIN SODIUM 5MG TABLE	FLOYD, FRANK D	05/02/2002	KK	60	4000		12.70	12.70		00
450459	0	00406036005	0	HYDROCODONE/APAP 7.5/750	FLOYD, FRANK D	06/20/2002	KK	60	4000		12.70	12.70		00
453593	0	00025152531	0	CELEBREX 200MG CAPSULE	HAMMOUD, WALID	02/01/2002	DB	40	4000		15.00	15.00		00
459222	0	00591552301	0	HYDROXYZINE HCL 25MG TABL	FLOYD, FRANK D	02/22/2002	DB	60	4000		116.89	116.89		00
459223	0	62794013106	0	ACTICIN 5% CREAM	FLOYD, FRANK D	03/12/2002	KK	30	4000		10.69	10.69		00
464261	0	00496082145	0	LOCODIN 0.1% LIPOCREAM	FLOYD, FRANK D	03/12/2002	KK	60	4000		24.42	24.42		00
467168	0	00088110947	0	ALLEGRA 180MG TABLET	NEWMARK, JOSEF	04/03/2002	DB	45	4000		50.53	50.53		00
471522	0	00025152531	0	CIPRO 250MG TABLET	NEWMARK, JOSEF	04/03/2002	MP	30	4000		24.42	24.42		00
476208	0	00025152531	0	CIPRO 250MG TABLET	VERDON, CATHY	04/19/2002	MP	30	4000		61.46	61.46		00
476208	1	00025152531	1	CIPRO 250MG TABLET	FLOYD, FRANK D	05/08/2002	BL	20	4000		76.42	76.42		00
483513	0	00026851351	0	CIPRO 500MG TABLET	FLOYD, FRANK D	05/30/2002	KK	30	4000		75.83	75.83		00
483513	0	00026851351	0	CIPRO 500MG TABLET	BIRD, JACE	07/10/2002	MB	30	4000		78.08	78.08		00
483513	0	00026851351	0	CIPRO 500MG TABLET	BIRD, JACE	07/06/2002	GG	60	4000		246.27	246.27		00

PAGE: 5 of 5  
 RUN DATE: 11/22/2004  
 REQUEST NBR: 123633

CVS PHARMACY  
 Patient Prescription Record  
 01/01/1998 11/19/2004  
 PHARMACY # 1951

PHARMACY NAME: CVS PHARMACY #1951  
 ADDRESS: 1103 NORTH ST,  
 CITY, ST, ZIP: ENDICOTT NY 13760

PATIENT KEY: 1951283181  
 PATIENT NAME: FITCHER KEVIN  
 ADDRESS: 517 RIVER TERRACE  
 CITY, ST, ZIP: ENDICOTT NY 13760

TELEPHONE: 607-748-5292  
 BIRTHDATE: 09/20/1959

EX	REF	DC	NUMBER	DRUG DESCRIPTION	PRESCRIBER NAME	DATE	RPH	QUANT	PRIMARY	SCDRY	TOTAL	PRIMARY	SCDRY	PATIENT
NUMBER						FILLED	INT	DISP.	PAYER #	PAYER #	PRICE	PD AMT	PD AMT	PD AMT
											5586.89	4531.91	.00	1054.98
											SCRIPT COUNT: 128	TOTAL AMOUNT:		

PAGE: 1  
DATE: 11/19/2004  
TIME: 09:45:53

CVS PHARMACY #1951  
PATIENT PRESCRIPTION RECORD  
01/01/2002 THRU 11/19/2004

PHARMACY NAME: CVS PHARMACY #1951  
ADDRESS: 1103 NORTH STREET  
CITY, ST, ZIP: ENDICOTT NY 137600000

PATIENT KEY: 02831801  
PATIENT NAME: KEVIN PITCHER  
ADDRESS: 517 RIVER TERRACE  
CITY, ST, ZIP: ENDICOTT NY 137600000  
TELEPHONE: 607-748-5292  
BIRTHDATE: 09/20/1959  
SEX: M  
RELATIONSHIP: H

CURRENT ALLERGIES ON RECORD:

None communicated by the patient

CURRENT CONDITIONS ON RECORD:

None communicated by the patient

EX NUMBER	NDC RFL NUMBER	DRUG DESCRIPTION	PRESCRIBER NAME	DATE FILLED	RPH INT	QUANT DISP.	PRIMARY PAYER #	SCDRY PAYER #	TOTAL PRICE	PRIMARY PD AMT	SCDRY PD AMT	PATIENT PD AMT
445119	00025152031	CELEBREX 100 MG CAPSULE SEA	FLOYD, FRANK D	01/09/2002	KM	60	4000		25.00	.00		25.00
				PRIMARY AUTH # : 09FEL7X				SECNDRY AUTH # :				
448334	00555083302	WARFARIN SODIUM 5 MG TABLETERR	FLOYD, FRANK D	01/23/2002	SX	60	4000		15.00	.00		15.00
				PRIMARY AUTH # : 099RET3				SECNDRY AUTH # :				
450459	00406036005	HYDROCODONE/APAP 7.5/750 TEMCK HAMMOUD, WALID		02/01/2002	DB	40	4000		15.00	.00		15.00
				PRIMARY AUTH # : OAM9KRF				SECNDRY AUTH # :				
442547	1 00093067006	GEMFIBROZIL 600 MG TABLET TEV	FLOYD, FRANK D	02/09/2002	KM	60	4000		15.00	.00		15.00
				PRIMARY AUTH # : OA39CNF				SECNDRY AUTH # :				
455393	00025152531	CELEBREX 200 MG CAPSULE SEA	FLOYD, FRANK D	02/22/2002	DB	60	4000		25.00	.00		25.00
				PRIMARY AUTH # : OCRQL79				SECNDRY AUTH # :				
459522	00591552301	HYDROXYZINE HCL 25 MG TABLET	FLOYD, FRANK D	03/12/2002	KM	30	4000		10.69	.00		10.69
				PRIMARY AUTH # : ODRTLXQ				SECNDRY AUTH # :				
459523	62794013106	ACTICIN 5% CREAM BER	FLOYD, FRANK D	03/12/2002	KM	60	4000		15.00	.00		15.00
				PRIMARY AUTH # : ODRWCNC				SECNDRY AUTH # :				
442547	2 00093067006	GEMFIBROZIL 600 MG TABLET TEV	FLOYD, FRANK D	03/14/2002	DB	60	4000		15.00	.00		15.00
				PRIMARY AUTH # : ODWFDL				SECNDRY AUTH # :				
448334	1 00555083302	WARFARIN SODIUM 5 MG TABLETERR	FLOYD, FRANK D	03/20/2002	KM	60	4000		15.00	.00		15.00
				PRIMARY AUTH # : OEWLKK				SECNDRY AUTH # :				
464262	62794013106	ACTICIN 5% CREAM BER	NEWMARK, JOSEPH	04/03/2002	KM	60	4000		15.00	.00		15.00
				PRIMARY AUTH # : OE1KC7A				SECNDRY AUTH # :				
464261	00496082145	LOCOD 0.1% LIPOCREAM FER	NEWMARK, JOSEPH	04/03/2002	DB	45	4000		25.00	.00		25.00
				PRIMARY AUTH # : OE3NNQ1				SECNDRY AUTH # :				
467768	00088110947	ALLEGRA 180 MG TABLET AVE	FLOYD, FRANK D	04/19/2002	MP	30	4000		25.00	.00		25.00
				PRIMARY AUTH # : OFWC3QH				SECNDRY AUTH # :				
442547	3 00093067006	GEMFIBROZIL 600 MG TABLET TEV	FLOYD, FRANK D	04/24/2002	KM	60	4000		15.00	.00		15.00
				PRIMARY AUTH # : OF7MXD7				SECNDRY AUTH # :				
448334	2 00555083302	WARFARIN SODIUM 5 MG TABLETERR	FLOYD, FRANK D	05/02/2002	KM	60	4000		15.00	.00		15.00
				PRIMARY AUTH # : OHLHE9F				SECNDRY AUTH # :				
471522	00026851251	CIPRO 250 MG TABLET BAY	VERDON, CATHY	05/08/2002	BL	20	4000		25.00	.00		25.00
				PRIMARY AUTH # : OHT9DLP				SECNDRY AUTH # : ARV				
442547	4 00093067006	GEMFIBROZIL 600 MG TABLET TEV	FLOYD, FRANK D	05/30/2002	SD	60	4000		15.00	.00		15.00
				PRIMARY AUTH # : OK3DLQP				SECNDRY AUTH # :				
476208	00025198031	BEXTRA 20 MG TABLET SEA	FLOYD, FRANK D	05/30/2002	KM	30	4000		25.00	.00		25.00
				PRIMARY AUTH # : OK3NNX9				SECNDRY AUTH # :				
448334	3 00555083302	WARFARIN SODIUM 5 MG TABLETERR	FLOYD, FRANK D	06/20/2002	KM	60	4000		15.00	.00		15.00
				PRIMARY AUTH # : OL91FDQ				SECNDRY AUTH # :				



PAGE: 2  
DATE: 11/19/2004 TIME: 09:45:53

CVS PHARMACY #1951  
PATIENT PRESCRIPTION RECORD  
01/01/2002 THRU 11/19/2004

PHARMACY NAME: CVS PHARMACY #1951  
ADDRESS: 1103 NORTH STREET  
CITY, ST, ZIP: ENDICOTT NY 137600000

PATIENT KEY: 02831801  
PATIENT NAME: KEVIN PITCHER  
ADDRESS: 517 RIVER TERRACE  
CITY, ST, ZIP: ENDICOTT NY 137600000  
TELEPHONE: 607-748-5292  
BIRTHDATE: 09/20/1959  
SEX: M  
RELATIONSHIP: H

RX NUMBER	NDC	DRUG DESCRIPTION	PRESCRIBER NAME	DATE FILLED	RPX INT	QUANT DISP.	PRIMARY PAVER #	SCDRY PAYER #	TOTAL PRICE	PRIMARY PD AMT	SCDRY PD AMT	PATIENT PD AMT
483513	00026851351	CIPRO 500 MG TABLET BAY	BIRD, JACE	07/06/2002	GG	60	4000		25.00	.00		25.00
				PRIMARY AUTH # :				SECNDRY AUTH # :		ARY)		
476208	1 00025198031	BEXTRA 20 MG TABLET SEA	FLOYD, FRANK D	07/10/2002	MB	30	4000		25.00	.00		25.00
				PRIMARY AUTH # :				SECNDRY AUTH # :				
484400	00093067006	GEMFIBROZIL 600 MG TABLET TEV	FLOYD, FRANK D	07/11/2002	FM	60	4000		15.00	.00		15.00
				PRIMARY AUTH # :				SECNDRY AUTH # :				
488411	99207000930	LOPROX 0.77% CREAM MED	STUBBS, G W	08/02/2002	KD	30	4000		25.00	.00		25.00
				PRIMARY AUTH # :				SECNDRY AUTH # :				
499539	46672005310	BUTALBITAL/APAP/CAFFEINE TEMIK NAWAN MAYSOON		10/02/2002	MD	20	1		11.49	.00		11.49
				PRIMARY AUTH # :				SECNDRY AUTH # :				
484400	1 00093067006	GEMFIBROZIL 600 MG TABLET TEV	FLOYD, FRANK D	11/06/2002	MP	20	1		.00	.00		.00
				PRIMARY AUTH # :				SECNDRY AUTH # :				
484400	2 00093067006	GEMFIBROZIL 600 MG TABLET TEV	FLOYD, FRANK D	12/02/2002	LJ	60	4000		15.00	.00		15.00
				PRIMARY AUTH # :				SECNDRY AUTH # :		ARY)		
514979	00026851351	CIPRO 500 MG TABLET BAY	FLOYD, FRANK D	12/20/2002	JJ	28	4000		25.00	.00		25.00
				PRIMARY AUTH # :				SECNDRY AUTH # :				
518455	00025198031	BEXTRA 20 MG TABLET SEA	FLOYD, FRANK D	01/09/2003	MP	5	1427		.00	.00		.00
				PRIMARY AUTH # :				SECNDRY AUTH # :				
518456	49884008601	DEXAMETHASONE 1.5 MG TABLET PAR	FLOYD, FRANK D	01/09/2003	MP	20	1427		.00	.00		.00
				PRIMARY AUTH # :				SECNDRY AUTH # :				
518457	00591565810	CYCLOBENZAPRINE 10 MG TABLET PAR	FLOYD, FRANK D	01/09/2003	MP	5	1427		.00	.00		.00
				PRIMARY AUTH # :				SECNDRY AUTH # :				
518454	00406035705	HYDROCODONE/APAP 5/500 TAB MCK	FLOYD, FRANK D	01/09/2003	MP	40	1427		.00	.00		.00
				PRIMARY AUTH # :				SECNDRY AUTH # :				
518457	1 00591565810	CYCLOBENZAPRINE 10 MG TABLET PAR	FLOYD, FRANK D	01/14/2003	JJ	30	1427		.00	.00		.00
				PRIMARY AUTH # :				SECNDRY AUTH # :				
518454	1 00406035705	HYDROCODONE/APAP 5/500 TAB MCK	FLOYD, FRANK D	01/14/2003	JJ	40	1427		.00	.00		.00
				PRIMARY AUTH # :				SECNDRY AUTH # :				
518455	1 00025198031	BEXTRA 20 MG TABLET SEA	FLOYD, FRANK D	01/14/2003	JJ	30	1427		.00	.00		.00
				PRIMARY AUTH # :				SECNDRY AUTH # :				
520480	00075062300	LOVENOX 100 MG PREFILLED SYR	FLOYD, FRANK D	01/18/2003	LL	6	4000		35.00	.00		35.00
				PRIMARY AUTH # :				SECNDRY AUTH # :				
523977	00555083302	WARFARIN SODIUM 5 MG TABLET BRR	FLOYD, FRANK D	02/04/2003	CC	60	4000		20.00	.00		20.00
				PRIMARY AUTH # :				SECNDRY AUTH # :				
531235	50111039101	SALSALATE 750 MG TABLET PKI	FLOYD, FRANK D	03/11/2003	LJ	100	4000		11.81	.00		11.81
				PRIMARY AUTH # :				SECNDRY AUTH # :				
635369	00075062160	LOVENOX 60 MG PREFILLED SYR	AHMED, SHOAB	10/09/2004	MD	3.6	1		294.99	.00		294.99
				PRIMARY AUTH # :				SECNDRY AUTH # :				
SCRIPT COUNT: 37									TOTAL AMOUNTS: 828.98	.00		828.98

**Exhibit**

**D**

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

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IN RE: NEW YORK BEXTRA AND CELEBREX  
PRODUCT LIABILITY LITIGATION

---

Index No. 762000/06

Hon. Shirley W. Kornreich

THIS DOCUMENT APPLIES ONLY TO CASES  
LISTED IN APPENDIX A TO MOVING PAPERS  
(RE: COMPLIANCE MOTION NO. 2)

---

**ATTORNEY AFFIRMATION**

STATE OF NEW YORK     )  
                                  ) ss:  
COUNTY OF BROOME     )

RONALD R. BENJAMIN, an attorney duly admitted to practice law before the courts of the State of New York, hereby affirms under penalties of perjury, except as to matters stated upon information and belief, as follows:

1. I am the attorney for certain plaintiffs as identified and listed in Appendix A to the Compliance Motion No. 2 of defendants Pfizer Inc., Pharmacia Corporation, and G. D. Searle, LLC (collective "Pfizer defendants"), seeking to dismiss their claims against the Pfizer defendants with prejudice for failing to comply with Case Management Order No. 6 and the Order entered by the Special Master, United States District Judge Fern M. Smith (Ret.), on November 5, 2007.
2. This affirmation supports opposition to the motion as well as the plaintiffs' cross-motion for an extension of time of sixty (60) days to comply with the requirements set forth the aforesaid orders on which the motion is based.
3. As this Court is no doubt aware, approximately two weeks after Mag. Smith entered

the aforesaid order, the Honorable Charles R. Breyer, United States District Judge presiding over MDL No. 1699, entered a lengthy opinion dated November 19, 2007, in which he held:

After carefully considering the parties' memoranda and evidence, and the testimony offered at the hearing, the Court concludes that plaintiffs have not presented scientifically reliable evidence that Celebrex causes heart attacks or strokes when ingested at the 200 milligram a day dose.

In Re: Bextra and Celebrex Marketing Sales Practices and Product Liability Litigation, 2007 U.S. Dist. LEXIS 85382, at \*40 (N.D.Cal. 2007).

4. Moreover, in the interim, the Honorable Eldon Fallon, presiding over the Vioxx MDL No. 1657, entered Pre-Trial Order No. 28, which announced a Master Settlement Agreement and imposed extensive requirements that were intended to and do affect the claims of plaintiffs with Vioxx claims pending in this Court. *See PTO 28 annexed as Exhibit A.*

5. Undersigned counsel is listed as representing twenty-one of the plaintiffs in Appendix A to the Pfizer defendant's motion, and also represents other plaintiffs before this Court who are not the subject of the motion.

6. As a result of Judge Breyer's decision and the overlapping events that have clearly raised significant issues as to the likelihood of success of each of the plaintiff's claims, your affiant has had to devote considerable time and effort to evaluate the individual claims of the plaintiffs he represents in the three different forums, and whether the claims of certain of the plaintiffs in this Court should be discontinued as a result of the impact of Judge Breyer's decision, thus obviating the necessity for compliance with CMO No. 6 or Magistrate Fern's order which was issued prior to Judge Breyer's decision and PTO 28 in the Vioxx MDL.

7. It is respectfully submitted that counsel should be afforded additional time to coordinate the effort to identify claims that should be discontinued, and to advise those plaintiffs

of the advice that they discontinue their claims, as well as to determine which plaintiff's claims, if any, should not be discontinued.

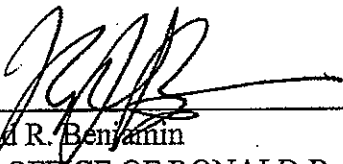
8. At this juncture, I can represent that I am ready to recommend discontinuance to a majority of the plaintiffs who are listed in Appendix A, but require additional time to handle this effort in a meaningful manner to preserve meritorious claims.

9. In according to this rules, I attempted to contact counsel for the Pfizer defendants, Christopher Strongosky, Esq., regarding this cross-motion and was advised he was not available today, and I have not received a return call from any attorney in his office.

10. It is respectfully submitted that the Pfizer defendants will be not prejudiced by the extension of time requested herein, particularly in light of the matters mentioned above.

WHEREFORE, it is respectfully submitted that this Court should deny Compliance Motion No. 2 as to the plaintiffs represented by the Law Office of Ronald R. Benjamin who are listed in Appendix A, or, in the alternative, should enter a conditional order granting the plaintiffs represented by the Law Office of Ronald R. Benjamin an extension of time, to and including sixty (60) days after the March 6, 2008 return date, and such other and further relief as the Court deems just and proper.

Dated: February 25, 2008  
Binghamton, New York

  
\_\_\_\_\_  
Ronald R. Benjamin  
LAW OFFICE OF RONALD R. BENJAMIN  
Attorneys for Certain Plaintiffs in Appendix A  
126 Riverside Drive, P. O. Box 607  
Binghamton, NY 13902-0607  
607/772-1442

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----  
KEVIN PITCHER,

Plaintiff,

-vs-

Case No. 08-Civ-3075

MERCK & CO., INC.,

Defendant.  
-----

**PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S  
MOTION TO STAY PENDING A DECISION ON TRANSFER BY THE  
JUDICIAL PANEL ON MULTI-DISTRICT LITIGATION, AND  
IN SUPPORT OF THE CROSS-MOTION PURSUANT TO 28 U.S.C. 1447(c)  
TO REMAND THE INSTANT CASE TO THE NEW YORK STATE  
SUPREME COURT, NEW YORK COUNTY FROM WHICH IT WAS REMOVED**

This memorandum of law is submitted in opposition to defendant Merck & Co.'s motion to stay all proceedings pending a decision by the Judicial Panel on Multi-District Litigation, and further supports plaintiff's cross-motion to remand this action pursuant to 28 U.S.C. 1447(c) back to the New York State Supreme Court for the County of New York from which it was improperly removed by defendant Merck & Co., Inc., on the grounds of alleged fraudulent joinder. Plaintiff respectfully submits that, because the removal to this Court is based solely on diversity jurisdiction, the cross-motion is dispositive as to the Court's lack of jurisdiction, and, therefore, it is proper to consider and grant this cross-motion despite the removing defendant's intention to seek transfer to multi-district litigation regarding its product.

**STATEMENT OF FACTS**

Plaintiff was originally named in the caption of a multi-plaintiff action filed on February 2, 2005, in the Supreme Court of the State of New York for the County of New York, entitled Charles H. Dixon,

Mayra Figueroa, Margharita Giordano, Mary K. Matias, Kevin Pitcher, and Marianne Raftis v. Pfizer, Inc., Pharmacia Corporation, a wholly-owned subsidiary of Pfizer, Inc., and Pharmacia & Upjohn Company, a wholly-owned subsidiary of Pharmacia Corporation, and Merck & Co., Index No. 101551/05, as confirmed by Merck's Acknowledgment of Service. *See Exhibit A to Attorney Affirmation of Ronald R. Benjamin ("Benjamin Aff.")*. By Administrative Order dated April 14, 2006, all cases seeking damages for ingestion of Bextra, Celebrex and Vioxx, whether alone or in combination, were assigned to the Hon. Shirley W. Kornreich for the purpose of coordination for all purposes. *See Administrative Order, annexed as last document in Merck's Ex. 4., at page 1*. Thereafter, plaintiffs in multi-plaintiff complaint captions were required to file separate actions, and plaintiff commenced a separate action by filing of the complaint with the New York Supreme Court for the County of New York on August 11, 2006. *See Complaint annexed as Exhibit 1 to Notice of Removal* As Merck appears to concede in its moving papers, it did not seek to remove the original complaint on fraudulent joinder grounds during the one-year period after it was filed, nor the separate complaint for the one-year period after it was filed.

On its face, the complaint alleges product liability and fraud claims against defendant Merck & Co., as well as Pfizer, Inc., arising out of the plaintiff's ingestion of their respective drugs Vioxx and Celebrex. *Id., at paras. 15-16*. It is clear from the complaint that plaintiff alleged indivisible injury based on the same personal injury risks posed by these two drugs. Defendant Merck has been provided with signed authorizations permitting it to obtain plaintiff's pharmaceutical records, and has not supported its motion with any evidence plaintiff did not, in fact, ingest Pfizer's drug as well as Merck's.

On the face of the original multi-plaintiff complaint and the instant complaint, it is clear plaintiff did not sue any physician, salesman distributor or fictitious John Doe; rather, they confirm he sued only the manufacturers of the two Cox-II inhibitor drugs she ingested, one of which was manufactured and

marketed by Merck's competitor, Pfizer. The complaint alleged both the plaintiff and defendant Pfizer are citizens of the State of New York, inasmuch as they both reside in the State of New York (*Notice of Removal, at para. 5*), and defendant's removal papers do not in any respect indicate there is any evidence that defendant Pfizer is not a citizen of New York State as alleged in the complaint at the time of filing. Instead, defendant Merck appears to concede that, absent the alleged fraudulent joinder, diversity of citizenship was not a basis for federal jurisdiction in this case at the time it was filed.

Plaintiff turns to the facts alleged that provide the basis for the claims against Pfizer. The complaint alleges that plaintiff "ingested the drug Bextra in or about 2002, as directed by his physicians and in accordance with the respective manufacturer's instructions." *Merck Ex. 1, Complaint, at para. 16*. The ingestion of Celebrex at the 200 mg daily dose in 2001 to 2002 is documented in medical records. *See Ex. C to Benjamin Aff.*

Merck is fully aware there is ongoing nationwide litigation against the Pfizer defendants, as well as multidistrict litigation, and that on November 19, 2007, the Honorable Charles R. Breyer issued an opinion holding that the "plaintiffs have not presented scientifically reliable evidence that Celebrex causes heart attacks or strokes when ingested at the 200 milligram a day dose." IN RE: BEXTRA AND CELEBREX MARKETING SALES PRACTICES AND PRODUCT LIABILITY LITIGATION (MDL No. 1699), 524 F. Supp. 2d 1166, 1169, 2007 U.S. Dist. LEXIS 85382 at \*40 (N.D.CA 2007).

Judge Breyer's order came within days after the Compliance Motion Order entered by Special Master Fern M. Smith, which required expedited compliance with discovery requirements of Case Management Order No. 6 within 21 days. *See Merck's Ex. 4 annexed to the Notice of Removal*. However, Judge Breyer's decision intervened and clearly impacted the viability of the plaintiff's claims based on his ingestion of Celebrex. Indeed, thereafter, Pfizer filed a motion for failure to



comply with Judge Smith's expedited order. On February 25, 2008, counsel for plaintiff filed a cross-motion for an extension of time based on the fact that "Judge Breyer's decision and the overlapping events...have clearly raised significant issues as to the likelihood of success of each of the plaintiff's claims [based on Celebrex]" which required him to evaluate the individual claims and identify claims that should be discontinued and advise the plaintiffs of the same. *See Ex. D to Benjamin Aff., Attorney Affirmation, at paras. 6-7.* Thereafter, on March 5, 2008, plaintiff's counsel signed the Stipulation of Dismissal with Prejudice Against Pfizer Defendants. *See Ex. 2 to Notice of Remand.*

### ARGUMENT

**The Removing Defendant Has Failed to Meet its Burden to Show Entitlement to Removal Based on the Matters Alleged with Regard to Purported Fraudulent Joinder With Respect to the Claims Against Pfizer Within the First Year After the Complaint Was Filed, And Is Not Entitled to a Stay and Granting the Cross-Motion to Remand Would Properly Divest the Federal Courts of Jurisdiction to Transfer to the MDL.**

Defendant Merck concedes that its notice of removal does not meet the time limitations in the rules, and seeks to place the blame for the same on the plaintiff. In response, plaintiff respectfully submits that, as the removing party, defendant Merck has "the burden of establishing that Pfizer is a nominal party and any doubts are to be resolved in favor of remand", since its notice of removal is tantamount to a claim that Pfizer was "joined for the sole purpose of destroying diversity." Marun Fashion and Sportswear, Inc., v. The Gillman Knitwear Co., 1992 U.S. Dist. LEXIS 6298, at \*1-2 (SDNY May 4, 1992). Indeed, it is respectfully submitted the law is well settled that:

"Removal statutes are construed narrowly and all uncertainties are resolved in favor of remand in order to promote the goals of federalism, restrict federal court jurisdiction, and support the plaintiff's right to choose the forum." *Curtin v. Port Auth. of New York*, 183 F. Supp. 2d 664, 667 (S.D.N.Y. 2002); accord *Somlyo v. J. Lu-Rob Enter., Inc.*, 932 F.2d 1043, 1045-46 (2d Cir. 1991); *Stamm v. Barclays Bank*, 1996 U.S. Dist. LEXIS 15781, No. 96 Civ. 5158 (SAS), 1996 WL 614087, at \*1 (S.D.N.Y. Oct. 24, 1996); see *Gilman v. BHC*

*Sec., Inc.*, 104 F.3d 1418, 1428 (2d Cir. 1997). The removing party has the burden of demonstrating that federal jurisdiction exists. *Grimo v. Blue Cross/Blue Shield*, 34 F.3d 148, 151 (2d Cir. 1994); *Curtin*, 183 F. Supp. 2d at 667.

Rubin v. Mastercard International, LLC, 2004 U.S. Dist. LEXIS 20528, at \*3 (SDNY Oct. 14, 2004).

Removing defendant Merck has failed to demonstrate that plaintiff has not pled a cause of action against Pfizer. Merck, as the removing defendant, has not adduced any facts showing that the medical literature raised no concerns as to the cardiovascular risks of Vioxx and Celebrex prior to plaintiff's ingestion thereof. The safety and risks of Vioxx, Celebrex and Bextra, all of which are selective cyclooxygenase 2 (COX-2) inhibitors, has been a matter of debate and ongoing study throughout the instant litigation. This is clearly confirmed by Judge Breyer's *Daubert* decision issued November 19, 2007.

In this case, the reason that Pfizer was stipulated out of the case was the ruling on expert testimony concerning 200 mg dose of Celebrex. Plaintiff's complaints against Pfizer and Merck have been pending for almost three years, which, plaintiff submits, supports remand in that more than a full year passed after plaintiff filed the separate action that was required by the New York court. The length of time these product liability claims have been pending evinces there was no fraudulent joinder despite the evolution of the litigation and the later events caused by Judge Breyer's decision.

Finally, plaintiffs respectfully submit that this Court should grant the instant motion for remand particularly in light of the possible transfer to the Vioxx MDL No. 1657 as suggested by defendant Merck in its motion, since "judicial efficiency and economy are better served by this Court considering, ***before the case is transferred to the MDL Court***, the Motion to Remand." Barragan v. Warner-Lambert Co., 216 F.Supp.2d 627,630, 2002 U.S.Dist. LEXIS 16443, at \*5 (WD Tex. 2002) [emphasis added]. "This Court, as transferor Court, retains exclusive jurisdiction until the § 1407 transfer becomes effective and as such, motions to remand should be resolved before the panel acts on the motion to

transfer." *Tortola Restaurants, L.P. v. Kimberly-Clark Corp.*, 987 F. Supp. 1186, 1189 (N.D. Cal. 1997).

There is a clear indication in the Judicial Panel's Rules of Procedure that:

the pendency of a motion, order to show cause, conditional transfer order or conditional remand order before the Panel concerning transfer or remand of an action pursuant to 28 U.S.C. §1407 does not affect or suspend orders and pretrial proceedings in the district court in which the action is pending and does not in any way limit the pretrial jurisdiction of that court.

*R. P. JPML 1.5* (2001). Moreover:

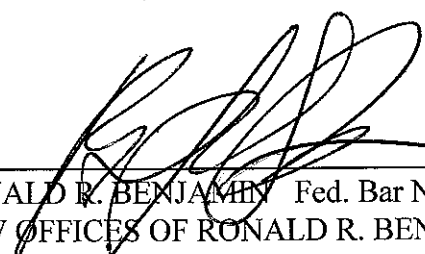
When notified of the filing of a motion for transfer, therefore, matters such as motions to dismiss or to remand, raising issues unique to the particular case, may be particularly appropriate for resolution before the Panel acts on the motion to transfer. The Panel has sometimes delayed ruling on transfer to permit the court in which the case is pending to decide critical, fully briefed and argued motions.

*Manual for Complex Litigation*, § 20.132, at 220-221 (4th Ed.) (emphasis added).

### **CONCLUSION**

In view of the aforesaid matters, it is respectfully requested that the defendant's motion for a stay of these proceeding should be DENIED, and plaintiff's cross-motion to remand this action to the New York State Court in New York should be GRANTED.

Dated: April 10, 2008  
Binghamton, New York



RONALD R. BENJAMIN Fed. Bar No. 101131.  
LAW OFFICES OF RONALD R. BENJAMIN  
Attorneys for Plaintiff  
126 Riverside Drive, P. O. Box 607  
Binghamton, New York 13902  
607/772-1442